In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-218

DOUGLAS B. FUGATE, COMMISSIONER, DEPARTMENT OF HIGHWAYS, COMMONWEALTH OF VIRGINIA,
PETITIONER

v.

ARLINGTON COALITION ON TRANSPORTATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS

Respondent Arlington Coalition on Transportation brought this action on February 19, 1971, to enjoin various federal and state officials from further planning and land acquisition for a six-mile section of Interstate Route 66 through Arlington County, Virginia. It contended that the defendants had acted illegally in continuing the planning and land acquisition for the highway without having first filed a final detailed environmental impact statement on the project pursuant to Section 102(2)(C) of the National Environmental Policy Act of 1969, 83 Stat. 852, 853,

477-582

42 U.S.C. 4332(2)(C). It also contended that the defendants had failed to make the necessary findings concerning injury to parklands caused by the project, as required by Section 4(f) of the Department of Transportation Act of 1966, 80 Stat. 931, 934, as amended, 49 U.S.C. 1653(f), and Section 18(a) of the Federal-Aid Highway Act of 1968, 82 Stat. 823, 23 U.S.C. 138.[1] Furthermore, respondent alleged that the requirements of 23 U.S.C. 128(a) compelled the state officials to hold a new public hearing on the location of the highway corridor before further action could be taken on the road.

Before trial, the federal defendants declared their intention not to authorize construction of the road until the requisite impact statement, encompassing both a NEPA review of the environmental impact and the "section 138–4(f)" findings, had been filed with the Council on Environmental Quality.[2] On cross-motions for summary judgment, the district court dismissed the complaint on October 8, 1971 (Pet. App. 30–43).

On November 24, 1971, the court of appeals granted the complainant's motion for an injunction pending appeal (Pet. App. 29). In an opinion dated April 4, 1972, the court of appeals reversed the district court's judgment and ordered that court to grant "injunctive

[1] Section 4(f) of the Department of Transportation Act is virtually identical to Section 138 of Title 23. See *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402.

[2] This commitment was reaffirmed in an affidavit submitted by federal officials to the district court.

and such other relief as may be necessary" (Pet. App. 28).

The court held that Arlington I–66 is subject to the requirements of Section 102(2)(C) of the National Environmental Policy Act (NEPA), although planning for the highway, as well as land acquisition, had commenced and progressed substantially prior to the date that NEPA became effective. The court stated that its holding did not give retroactive effect to NEPA, because Arlington I–66 had not yet reached the point where the costs of altering or abandoning the project would definitely outweigh whatever benefits might flow from an application of the statutes. The court held this to be the proper test, in light of the directive in Section 102 that NEPA be applied "to the fullest extent possible."

Similarly, the court reasoned that since Section 102 of NEPA requires that "to the fullest extent possible * * * [the] public laws of the United States shall be interpreted and administered in accordance with the policies" set forth in the Act, Section 4(f) of the Department of Transportation Act and Section 18(a) of the Federal-Aid Highway Act of 1968, 23 U.S.C. 138, also apply to this project initiated before their effective date. Therefore, the court held, the determinations with respect to the use of parklands required by those sections are necessary before the project may proceed.

Finally, the court also relied on the above language of Section 102 in requiring the application to this

project of the 1968 amendment to Section 128 of Title 23. Accordingly, the court ruled that the public hearing held before Arlington I-66 received federal location approval in 1958 was now insufficient, since, as then required, it dealt only with economic effects. The court directed a new public hearing, to consider also the social, environmental, and urban planning aspects of the highway's location, as required by the 1968 amendment of Section 128, and also to consider the changes in economic effects since the prior hearing (Pet. App. 23).[3]

1. The court's holdings with regard to NEPA and Sections 4(f) and 138 coincide with the earlier determination by the requisite federal officials to file the environmental statements required by those provisions, and in the circumstances these holdings are not seriously presented in the petition as a basis for further review (see Pet. 11). Although the standard articulated by the court below to determine the applicability of NEPA and the highway statutes to on-going projects is somewhat vague and potentially troublesome, it cannot be said that the application of those statutes here is in conflict with decisions of other courts of appeals under differently (and, we believe, prefer-

[3] The petition also challenges the refusal of the court below to apply the doctrine of laches in this case. We did not argue that defense below, and we do not believe the question of the doctrine's applicability to the particular facts of this case warrants review by this Court.

ably) articulated standards.[4] As the court below noted, Arlington I–66 has not received final federal approval, contracts have not been let, and construction has not yet begun. In any event, since federal officials have now undertaken to comply with these statutes with respect to this project, there is no need for further review of this aspect of the case.

2. The decision by the court of appeals that a new public hearing must be held on the location of Arlington I–66 is more troublesome. Reopening of the hearing process with respect to the thousands of federal-aid highway projects underway throughout the country would cause significant administrative difficulties and, in our view, was not required by Congress. However, because of the particular facts of this case, including the possibility of very substantial changes in the relevant factors since 1958, we believe the decision below does not establish a precedent of sufficiently general applicability to require further review by this Court. In our view, the interests of reaching a proper

[4] See *Pennsylvania Environmental Council, Inc.* v. *Bartlett*, 454 F. 2d 613 (C.A. 3); *Wildlife Preserves, Inc.* v. *Volpe*, 443 F. 2d 1273 (C.A. 3); *Concerned Citizens of Marlboro* v. *Volpe*, 459 F.2d 332. (C.A. 3); *Lathan* v. *Volpe*, 455 F.2d 1111 (C.A. 9). See also *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402; *Calvert Cliffs' Coord. Com.* v. *United States A. E. Com'n*, 449 F.2d 1109 (C.A. D.C.). Furthermore, the holding by the court below that the Secretary of Transportation may take into account the previous investment in the proposed route (Pet. App. 15) is a realistic recognition of the difficulties created by applying these statutes to on-going projects such as Arlington I–66.

and prompt final decision on this project will best be served by compliance with the decision below, and the federal defendants will, accordingly, require the petitioner to hold the necessary hearing.

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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